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No. 99 - 1758

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

DELAWARE RIVER PORT AUTHORITY,
Petitioner,

v.

FRATERNAL ORDER OF POLICE,
PENN-JERSEY LODGE 30 AND JOSEPH VENA,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF *AMICUS CURIAE* OF WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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NOTICE OF CONSENT

This brief is filed with the consent of Petitioner and Respondent, by and through their counsel. Originals of the consents have been filed with the Clerk of the Court[1].

STATEMENT OF INTEREST

The Washington Metropolitan Area Transit Authority ("WMATA") is an Interstate Compact Agency founded and bounded by the terms of an Interstate Compact among the Commonwealth of Virginia, the State of Maryland, and the District of Columbia, with the consent of the Congress of the United States. *See Interstate Compact of the Washington Metropolitan Area Transit Authority*, Pub. L. 89-774 (November 6, 1966) at 80 Stat 1324, as amended thereafter from time to time; *see also Hess v. Port Authority of New York*, 513 U.S. 30 (1994) (noting that WMATA is an Interstate Compact Agency within the meaning of the Compact Clause of the United States Constitution, Art. I, Section 10). WMATA employs nearly 9,000 people and is the primary provider of transit services within the Washington, D.C. metropolitan area.

The construction and interpretation of interstate compacts approved by Congress pursuant to the Compact clause is a matter of federal law. *See, e.g., Cuyler v. Adams*, 449 U.S. 435 (1981). The decision of the Court below undermines the settled and uniform interpretation of such Compacts in ways that create substantial mischief that, if allowed to stand, and if adopted by courts outside New Jersey as an acceptable way of interpreting Compacts, would substantially impair that certainty of result and predictability of the law that is essential to the operation, not just of WMATA, but of all

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[1] Counsel for the *amici curiae* authored the brief in its entirety. No person or entity other than the *amicus*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

Compact agencies throughout the country. For this reason, WMATA has a substantial practical interest that would be significantly impaired in the absence of a grant of certiorari.

SUMMARY OF ARGUMENT

Mindful of this Court's admonition to *amici* to add to and not just repeat the arguments of the parties directly involved in a case (*see Supreme Court Rule 37.1*), WMATA will confine its brief to demonstrating how the ruling below, by departing from settled law, undermines WMATA's operations. We will also show why that decision cannot stand under principles of federalism as old as *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and as fresh as the recent decision in *Alden v. Maine*, _U.S._, 144 L. Ed. 2d 636 (1999).

ARGUMENT

I. BY ABRUPTLY DEPARTING FROM SETTLED LAW, THE DECISION BELOW MAY SUBSTANTIALLY IMPAIR THE OPERATIONS OF WMATA AND OTHER INTERSTATE COMPACT AGENCIES.

A. The Structure of the WMATA Compact and Settled Law

The WMATA Compact establishes early on that WMATA is a "common agency" of its signatory parties. *WMATA Compact*, Art. II, Section 2, at D.C. Code Ann. Section 1-2431(2). (Hereinafter the WMATA Compact will be referred to by section number. The whole of the Compact may be found in the D.C. Code, Section 1-2431, with identical versions in the laws of the other signatories.) That phrase has been interpreted to mean that WMATA is both an entity in and of itself whose operations are subject to the powers and limitations of the Compact, and an agency of each of the states and the District of Columbia as well. *See Diven v.*

Amalgamated Transit Union Int'l & Local 689, 38 F. 3d 598, 601 (D.C. Cir. 1994) (for purposes of federal labor law exemption, WMATA is a "political subdivision" of all its signatories); *PEPCO v. State Corporation Commission*, 221 Va. 632 (1980) (WMATA is an agency of Virginia for purposes of Virginia law governing the sale of electricity within the state).

This dual status, as a separate entity governed solely by its Compact and as an agency of the states in areas where the states and the District of Columbia, *by the Compact*, retain the right to govern WMATA's conduct, is inherent in the purpose and structure of all interstate compacts. By their nature, interstate compacts are entered into precisely because the signatories are willing to surrender a modicum of the sovereignty they otherwise retain to accomplish a purpose that has a benefit beyond the borders of their state. In that sense a compact agency like WMATA acts both as a separate entity, and as an entity that is the creature of its individual signatories as expressed by the terms of the Compact. The characterization of such an interstate compact has been variously described by this Court as analagous to a "treaty," *West Virginia ex. rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951) (Frankfurter, J), or to a contract, *Texas v. New Mexico*, 482 U.S. 124 (1987). Until the decision below, no court had ever disputed that: " [it] requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a state . . . can be given final meaning by an organ of one of the contracting states." *West Virginia ex. rel. Dyer v. Sims, supra*, 341 U.S. at 28.

Rather, the ability of a state to change the nature and extent of its delegation of authority to the Compact agency is governed solely, it has always been assumed, by the specific and complete amendment provisions of the Compact itself. In WMATA's case, for instance, its Compact provides that

amendments changing the Compact can only be made only if an amendment specifically amending the Compact is consented to by legislation subject to the concurrence of both the legislatures of the signatories, their executive officers, and the Congress. *See Compact,* Section 84 ("Amendments and supplements to this Title to implement the purposes thereof may be adopted by legislative action concurred in by all of the others. When one Signatory adopts an amendment or supplement to an existing seetion of the Compact, that amendment or supplement shall not be immediately effective, and the previously enacted provision or provisions shall remain in effect in each jurisdiction until the amendment or supplement is approved by the other Signatories and is consented to by Congress."). This solemn requirement has been interpreted historically by WMATA to require that any amendment to the Compact is effective if, and only if, it is adopted *in pari materia* in all respects by each of the jurisdictions and consented to by the Congress. Thus, when recent amendments were proposed to the signatories to change and somewhat expand the police powers delegated by the signatories to WMATA, Virginia and the District of Columbia included a sentence expanding the power of arrest of on-duty Transit Police officers; Maryland rejected this portion of the proposal. The amendments were submitted to Congress and approved without the language objected to by Maryland. *Compare* Pub. L. No. 105-151, 111 Stat 2686 (1997) with 1997 Laws of Maryland, Ch. 699; 1995 Acts of Virginia, Ch. 150; and D.C. Law 11-138 (1996). This interpretation of the nature of the amendment process is consistent with the cases discussed below on the necessity for joint, and not unilateral, amendment of a Compact.

B. The Compact Itself States the Only Way the Compact May be Amended

The reasons for these strict formal requirements for amendment flow both from the nature of the Compact itself,

and from the practical difficulties that would inhere if any other rule, such as the rule proposed by the decision below of "amendment by implication," were adopted.

The argument from the nature of the Compact itself is one of Constitutional dimension. A Compact involves some surrender of state sovereignty to accomplish the common end served by the Compact . Thus, the express provisions of the Compact may in certain respects, indeed important respects, differ from the state law governing the same or similar conduct. The state may by agreement delegate to the Compact agency the power to make internal rules, such as rules governing procurement, labor, or operations, for its own governance, and these rules may differ in major and minor ways from the state's own laws governing its citizens. The Compact itself may specify that state law may govern some activities of the agency that take place within the territory of a single signatory. For instance, the WMATA Compact expressly provides that the laws of the respective signatories shall govern traffic requirements, zoning, and health and safety matters, to the derogation of the Authority's power to act independently. *See Compact*, Section 75. This express retention of authority meets both practical concerns (it would be difficult to imagine an interstate agency that had independent authority to set speed limits, for instance) but is also consistent with the notion that those powers conceded to or delegated to an agency by a Compact are within the province of the Compact agency unless the Compact itself designates local law to govern. Just as importantly, however, the powers not granted directly or by implication to the Compact agency are retained by each signatory. The Compact is a form of limited self-government for the agency; it is not a justification for any state to exercise its own powers in derogation of the sovereignty retained by the other parties. For one sovereign to have a power to regulate, by legislation, court fiat, or otherwise, matters that directly concern the power of the other sovereign parties to the Compact over their

own agencies involves an assertion of the sovereign power of the legislating state beyond its Constitutional power to act under the Tenth Amendment, unless that power has been specifically delegated to the Compact agency.

This theoretical and legal construct has practical significance. If each signatory were given the right to impinge on the sovereignty of the others, even in matters where all sovereigns have addressed the issue in some manner, the agency could never determine with precision whether the legislation of the signatories were congruent enough to amount to an amendment of the Compact by implication. Even if there were some substantial broad congruence, whether and to what extent particular provisions of particular legislation of one signatory applied when the legislation of other signatories was silent or had provisions that differ would vex the sturdiest logician. If God is in the details, so is the Devil. Requiring a Compact agency to choose among the details even of parallel legislation requires the Agency to favor one sovereign at the expense of the other, subject always to the power of the Court of a disfavored sovereign to second-guess the choice. In WMATA's case, potentially three different courts of three different jurisdictions could could pick and choose to apply different provisions of ostensibly parallel legislation that a court of one of the sovereigns had decided on its own authority amended the Compact, even if the courts or the legislatures of the other signatories determined to the contrary. Indeed, even if the courts of only one of the three jurisdictions in which WMATA operates were to adopt the reasoning of the New Jersey court, the result would be either a surrender of amending power solely to the state adopting the New Jersey construction or, more likely, retaliatory decisions by the courts or legislatures of the other parties. Confusion would soon deteriorate to chaos. "What's a body to do?" should not be the governing principle of any law, much less the law governing a body which operates across borders where each

sovereign may have different laws. If courts in the jurisdictions in which WMATA operates were to follow the New Jersey decision here, the result would be not only greatly increased business for lawyers both in and out of house, but paralysis in operations and chaos in the field as workers charged with obeying the law struggled to determine what exactly the law was they were charged to obey. And if different law applied to different jurisdictions, the conflict would have serious repercussions for those who innocently sought to follow some law, any law, in the absence of authoritative interpretations. That is no way to run a railroad or a bus line.

For these reasons, the local courts that have interpreted the WMATA Compact have held that the Compact governs those powers delegated to the Authority by its terms, even if that grant conflicts with state law. It follows, the courts have held, that the only way to amend the Compact is by the terms of the Compact itself: with the knowing, full consent of the Commonwealth of Virginia, Maryland, the District of Columbia and the Congress evidenced by identical legislation adopted by all the signatory parties and consented to by the Congress.

Thus, in *Malone v. WMATA*, 622 F. Supp 1422 (D.C. Va. 1985), an employee of WMATA argued that the Virginia labor law, which contained a right to work provision, continued to govern his substantive right to refuse to join a union shop, notwithstanding that the Compact, itself, contained a provision mandating WMATA to engage in collective bargaining with its unions and, implicitly, to reach agreements that contained union shop clauses. In finding that the Virginia law did not apply, the Court correctly reasoned that insofar as the signatory jurisdictions had entered into the Compact, they had agreed to abide by the terms of the Compact, even if those terms conflicted with state law that would otherwise govern. The Compact was judged para-

mount not only because the Compact as federal law was supreme over the law of the states, but also because the nature of the Compact itself was a bargain that bound the parties by its terms.

In *C.T. Hellmuth & Assoc., Inc. v. WMATA*, 414 F. Supp. 408 (D. Md. 1976), the court considered and rejected the identical argument adopted by the New Jersey court here in recognizing the theory of "implied amendment." There, the plaintiff sought to invoke his alleged statutory rights to freedom of information to obtain documents from WMATA. The Compact did not specifically address the question of freedom of information, although the Compact gave WMATA's Board of Directors clear authority to adopt, repeal and amend rules and regulations governing the operation of the Authority (*Compact*, Section 12 (c)), a power it had not exercised in the case of freedom of information. The plaintiff claimed that an amendment by implication could be construed from the fact that all the signatories had enacted freedom of information laws to govern their own agencies, and, because these laws were "substantially similar," should be treated as implied amendments to the Compact.

This argument was soundly rejected by the court for reasons that echo here. The court noted that a Compact was a "contract which may not be amended, modified, or otherwise altered without the consent of all the parties." *Id. at 409*. If the Compact were to be amended, it would have to be amended by its terms, since even if legislation with parallel subject matter had in fact been enacted by each of the signatories, those pieces of legislation differed in their details. *See Id.* at 410, fn. 5 (cataloguing a number of details in which the legislation of the signatory states differed). The existence of these details, or the possibility that the details might differ, made amendment by implication a dead letter as a matter of law, since "Maryland may not impose its preferences in this regard upon Virginia and the District, for such an imposition,

however minimal, was nonetheless an intrusion upon their interest and in derogation of the Compact." *Id.* at 410.

The *Hellmuth* decision cuts out the logical heart of the decision under examination. Even if a court of a single jurisdiction could predictably determine when and if the signatories had enacted parallel legislation, that would not end the matter of determining the content of the amendment. Each state may act on a similar subject in a similar broad way (i.e., by recognizing a citizen's right to obtain some documents from government). But that similarity breaks down in the details. One state, either by statute or decision, may recognize a particular request as subject to an exemption; another state may not. Faced with such conflict, WMATA, at its peril, would be required to choose which of the signatories' laws will apply. Any choice it makes would be in derogation of the law of one of the other signatories, and subject to examination by the courts of all three jurisdictions that are parties to the Compact. Thus, if WMATA chose to recognize an exemption contained in District law, but not in the law of Virginia, a Virginia court might find the choice invalid, while the District of Columbia courts would presumably uphold the action. Maryland might have an entirely different position. The result would be gridlock in practice, and, as a theoretical matter, would enable WMATA, or the courts of one or all of its signatory jurisdictions, to act in ways contrary to the choices made by the legislatures or the courts of other signatory jurisdictions. Thus, although all the states might recognize a broad right, once that right is reduced to specifics, the possibilities for confusion, contradiction, and insults to the sovereignty of each of the signatories becomes not only likely, but inevitable.

This Court ought to have compelling reasons of constitutional dimension to permit a State to so impinge upon the sovereignty of its co-equal states and to undermine the

law of the United States contained in the Compact. No such reason exists: in fact, the opposite result is compelled by the Tenth Amendment to the Constitution, and by this Court's very recent construction of the architecture of federalism created by the Constitution.

II. State Sovereignty Is an Interest of Constitutional Dimension and Bars Amendments to an Interstate Compact by Implication.

Petitioner here has ably argued the case against the New Jersey court's action in the case at bar. However, there is another argument only touched upon by petitioner that WMATA believes is sufficient in itself to invalidate the action of the intermediate New Jersey state appellate court. That principle is one of the fundamental federalism created by the Constitutional scheme of allocating powers among the States themselves, and between the States and the federal government.

It has been well-established, at least since *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), that states may not tax directly the operations of the federal government. The reason for this rule is obvious: if the states were given the power to tax the federal government, that power could be exercised in ways that undermined the fundamental sovereignty of the federal government operating in its own sphere. Although "all powers over which the sovereign power of a state extends are objects of taxation" Justice Marshall held, it was equally true that "those over which the sovereign power of a state does not extend are, upon the soundest principles, exempt." *Id.* at 429. The people of a single state could not extend its power to tax to the federal government without undermining the allocation of sovereignty between the states and the federal government created by ratification of the Constitution.

If *M'Culloch* established the principle that a state could not exercise its law-making powers in ways that invaded the sovereignty of the federal government, recent precedent has established that the right of the states to exercise their retained sovereignty free of federal interference is as real and as constitutionally based as the immunity of the federal government from direct regulation by the states.

These retained sovereignty cases have sometimes arisen under the Tenth Amendment, sometimes under the Eleventh, but whatever the source of the right in the particular case, the right of the states to exercise their sovereignty free of interference by the federal government is of Constitutional dimension. In this case, the Tenth Amendment furnishes the touchstone. That amendment provides that the powers not delegated to the United States by the Constitution are "reserved to the States *respectively* or to the people." *Constitution of the United States, Amendment X.* (emphasis supplied). Those powers that remain with the states and have not been ceded to the federal government by the Constitution are thus retained by the states not only against federal encroachment, but also free from the power of other states to regulate matters solely confined to the sovereignty of a particular state. The attempt by one state to exercise power over another state's governmental affairs in matters within the second state's sovereignty is a corrupt exercise of power barred by the Tenth Amendment. Under that amendment, the powers reserved to each state individually and respectively may neither be interfered with by the federal government nor by the government of any other state, absent an agreement by the state itself to surrender a part of that sovereignty by means of a constitutionally provided for Interstate Compact.

Thus, except where the states have agreed explicitly to confer upon Congress a power by legislation to regulate the conduct of the state itself (e.g., the Fourteenth Amendment, Section 5) or where a state itself has voluntarily waived its

immunity from federal legislation, the State retains its Eleventh Amendment immunity notwithstanding the express efforts of Congress to waive that right for the states. In this case, the whole is not greater than the sum of its parts, because those "parts" have co-equal dignity with the federal government. *See College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Board*, __ U.S.__, 144 L. Ed. 2d 605 (1999).

And, as this Court has recently held, this retention of sovereignty by the states as against the federal government is rooted not only in the explicit provisions of the Tenth and Eleventh Amendments, but in the structure of the Constitution itself. Thus, in *Alden v. Maine*, __U.S.__, 144 L. Ed. 2d 636, (1999), this Court explained why a state government was not subject to suit under the Fair Labor Standards Act in its own courts. While the Eleventh Amendment cases had established that a state could not be subjected to FLSA action in the federal courts, suits in the state courts under federal law did not implicate the Eleventh Amendment, the plaintiff claimed, because that amendment applied only to suits against the state under federal law brought in federal courts. Use of the state court to vindicate the federal right did not, the plaintiff claimed, implicate any right of the state of Constitutional dimension. A majority of this Court rejected that argument.

In finding that suit against the state under federal law was constitutionally barred even if brought in state court, this Court noted that "the States' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today except as altered by the plan of the Convention or certain Constitutional amendments." That residual sovereignty which was never surrendered to the federal government by the Constitution is "inviolable." 144 L. Ed. 2d at 652. No waiver of that immunity would be

implied; rather, there must be "compelling evidence" that the states had surrendered their sovereign immunity with respect to a suit, whether or not brought under federal law. *Id.* at 663. To permit a citizen to enforce federal law in any court by suit against a state was a violation of the fundamental sovereignty retained by the states at the time of the Constitutional convention and waiver of that retained sovereignty would not be implied. This was so because every waiver carried with it "substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the State." *Id.* at 676. When the federal government attempts to "assert authority" over a "State's most fundamental political processes, it strikes at the heart of political accountability so essential to our liberty and republican form of government." *Id.*

The logic of that decision limiting the power of the federal government to force a waiver of sovereignty on the States leads to the conclusion that the retained sovereignty of each of the States bars attempts to control or regulate the conduct of the state itself by an equal sovereign, another State, at least absent express consent. Although the states may, subject to due process and dormant commerce clause limitations, indirectly regulate the conduct of out-of-state citizens through the exercise of their police power, it certainly does not follow that one sovereign state has the power to regulate the conduct of other states and their agencies. To grant such a power would completely undermine the principle "so essential to our liberty and republican form of government" that only the State itself may regulate its own conduct, or waive its otherwise sovereign rights.

Maine may, for instance, impose its own traffic laws on citizens of Vermont who travel in the state. It may tax, subject to due process limitations, sales that have a locus in the State even if the purchaser is not a citizen of Maine. In short, it may exercise its own sovereignty in ways that may

regulate incidentally citizens of another state. But if Maine sought to compel the state of Vermont to apply Maine's traffic laws within Vermont's borders, or sought to compel the agencies of Vermont to obey Maine's labor laws governing the right of government workers to unionize, or any other law for that matter, then a Constitutional line has been crossed. Extra-territorial application of the laws of a State are always subject to scrutiny, but extra-territorial attempts to regulate the affairs of another state are always forbidden absent compelling evidence of consent, just as state attempts to impose its rules directly on the federal government are forbidden. Such efforts constitute a vile and pernicious interference by one state in the affairs of another, and cannot, after *Alden*, survive challenge.

Yet, such vile and pernicious interference with the sovereignty of Pennsylvania is just what the court of New Jersey did here. By applying New Jersey law to an interstate compact agency it sought to impose New Jersey's will and New Jersey law on an agency of the Commonwealth of Pennsylvania beyond the scope of Pennsylvania's waiver of its own sovereignty when it consented to be bound by the treaty/contract/agreement called a Compact. It does not matter that the law New Jersey seeks to apply because of an "amendment by implication" has some counterpart in Pennsylvania law. Unless Pennsylvania has expressly waived its right to apply its own law to its own agencies, New Jersey cannot act to usurp the sovereignty of Pennsylvania. It is up to Pennsylvania alone to decide the law governing its own agencies unless New Jersey and Pennsylvania's governments have knowingly and solemnly ceded a portion of that sovereignty to a common agency established by Compact by approving the initial Compact, or have knowingly consented to an explicit amendment to that Compact.

Moreover, these interests are real and must be given effect even if the laws of both jurisdictions are similar in all

respects. This is so because any application by one court of the "joint law" of the court's home state and another jurisdiction to an agency of a sister state equally infringes the sovereignty of the other state. A state, as an incident of its own sovereignty, retains the right to interpret its own law in its own way. New Jersey's reading of the same words may differ from the reading a Pennsylvania court might give in a number of ways. One state may adopt an absolute plain meaning rule; the other may look to extrinsic sources to guide interpretation. The standards applied may portend different results even if the language of the two enactments are the same. To borrow Professor Lon Fuller's famous example, one state's notion of a "vehicle" may encompass a baby buggy or a bicycle; the other state's may not.

Similarly, even if the New Jersey court had exercised some restraint and required an absolute congruence of two statutes before an implied amendment of a Compact could be inferred, that rule too would undermine the ability of each of the interested States to amend their own laws. If only identical laws amended a Compact agency by implication, then the effect of an amendment to the law applied by implication would either repeal the law's application to the Compact agency, thereby creating confusion and disorder by the unilateral act of one of the parties to the Compact, or else the unamended law would continue to govern the Compact agency, in derogation of the sovereignty of the amending state. In this area, as the Court stated in another Compact context, "the pertinent inquiry is one of potential, rather than actual impact" on the "sovereignty" of each of the parties to the Compact. *U.S. Steel Corp. v. Multistate Tax Commission*, 432 U.S. 452, 472 (1978).

This analysis is implicit, at least, in all those cases considering the power of a state unilaterally to amend a Compact or to impose its law in the absence of an express provision in the Compact. *See C.T. Hellmuth, supra; Cal*

Tahoe Regional Planning v. Sahara Tahoe Corp., 504 F. Supp. 753, 761 (D. Nev 1980)(California has no power without authorization under the Compact or express consent of Nevada to pass legislation that affects the inner workings of a Compact agency).

We close with the words of Justice Frankfurter, long-time champion of federalism, writing in *West Virginia ex. rel. Dyer v. Sims*, 341 U.S. 22, 28. There, in interpreting the scope of an Interstate Compact, Justice Frankfurter wrote:

> "It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for the State can be unilaterally nullified, or given final meaning, by an organ of one of the contracting states."

By attempting to usurp authority that constitutionally resided in Pennsylvania alone without securing the agreement by Pennsylvania to a common amendment to the Compact, the New Jersey court struck at the heart of federalism in a way that should be overturned without delay. This Court should take this opportunity to vindicate those important principles, particularly where, as here, the aberration produced by the New Jersey court could have deleterious repercussions for all Compact agencies if allowed to spread. This case may, with time, prove to be a derelict, but that is only a hope. If it is a derelict, this Court should sink it now and spare all Compact agencies the agony of dealing with this indefensible usurpation by a single court of the sovereignty of a sister state.

Respectfully submitted,

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